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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 375

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R. GORDON LEVI, - - - - - - Petitioner,

*versus*

COMMONWEALTH OF KENTUCKY, - Respondent.

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. _____

R. GORDON LEVI, - - - - - - *Petitioner,*

*v.*

COMMONWEALTH OF KENTUCKY, - - - *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

R. Gordon Levi, defendant in a criminal action prosecuted in the State Courts in the Commonwealth of Kentucky, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky, entered on April 22, 1966.

## OPINIONS BELOW.

The Circuit Court of Harrison County, Kentucky, rendered no opinion. The original opinion of the Court of Appeals of Kentucky rendered on October 15, 1965, affirming, and its opinion rendered on April 22, 1966, overruling petitioner's petition for a rehearing have

not yet been officially reported. The mandate of the Court of Appeals of Kentucky issued on April 22, 1966. A copy of said opinions and the mandate are appended hereto on pages _____.

## JURISDICTION.

The final judgment of the Court of Appeals of Kentucky was rendered on April 22, 1966, and the mandate issued on that same date. Copies are attached as indicated in the foregoing section.

No extension of time for filing this petition for writ of certiorari has been obtained and it is filed within the ninety days prescribed by Rule 22 of the Rules of the United States Supreme Court.

The jurisdiction of the Court is invoked under Title 28, Section 1257 (Sub-Section 3).

## QUESTIONS PRESENTED.

After the jury received their instructions from the Court they retired for deliberation in the custody of the Harrison County Sheriff, C. C. Hall.

Sheriff Hall was a prosecuting witness against the defendant and his testimony was highly prejudicial to the defendant (T. 63-68). About one hour after the jury had retired for deliberations, Sheriff Hall knocked on the door of the judge's chambers. In chambers with the judge when Sheriff Hall knocked on the door with a question from the jury room were Commonwealth At-

torney, G. L. Tucker; County Attorney, John M. Keith; and defense counsel, John Y. Brown and Royce C. Pulliam. The petitioner had remained at the defense counsel table in the Court Room.

The question from the jury written on the paper related to the time petitioner would have to stay in prison if the jury returned a verdict of 2 years, 5 years, 10 years or 21 years. It was agreed that the judge could not answer the questions. The judge returned the note to the jury by the Sheriff with: "This is strictly a matter for the parole board and is not the concern of the jury." The Sheriff left the chambers and returned the paper to the jury alone (HOMFNT 2-4).

About three weeks after the trial, Royce Pulliam, counsel for petitioner, overheard a conversation between two citizens of the community where the trial had taken place regarding petit juror Herman McClanahan. When questioned by Mr. Pulliam, both citizens stated that prior to the trial juror McClanahan had stated in their presence, "I don't know about his guilt but if I was on the jury I would send him (petitioner Gordon Levi) to prison for things he has done in the past" (HOMFNT, 8).

## QUESTION I.

**Whether It Was a Denial of Petitioner's Right to a Trial by an Impartial Jury and the Denial of Due Process of Law to Be Tried by a Juror Who Harbored a Secret Bias and Prejudice Against the Petitioner, Such Bias and Prejudice Not Having Been Discovered Until After the Trial For Murder of Petitioner, the Penalty For Which Is Death or Life in the Penitentiary.**

## QUESTION II.

**Whether It Was a Denial of Petitioner's Right to a Fair and Impartial Trial and the Denial of Due Process of Law For the Jury to Be Placed in the Custody of a Sheriff Who Had Been a Prosecuting Witness Against Petitioner, and Who Acted as a Courier For Communication Between the Jury and Judge While the Jury Was Retired in Deliberations.**

## QUESTION III.

**Whether It Was a Denial of Petitioner's Right to Be Present at Every State of His Trial and a Denial of Due Process of Law For the Trial Judge to Respond to a Question Submitted by the Jury to the Court Without Calling the Jury Into the Open Court Room So That the Question Could Be Answered in the Presence of Petitioner.**

The sections of the Constitution of the United States involved are:

### AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, . . . nor be de-

prived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

AMENDMENT XIV.

Section I.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE.

The essential facts concerning the issues as raised by the petitioner herein are not in dispute. The petitioner was called by the Harrison Circuit Court to stand trial on his indictment for murder, on May 24, 1964.

After all the evidence had been presented and the jury had retired for deliberation, the Sheriff was presented with a piece of paper which contained a question for the Court concerning when the petitioner would be eligible for parole if various sentences were imposed.

The Court in its response stated, "This is strictly a matter for the parole board. You are not to consider it in any way." This response was written on the sheet of paper and handed to the Sheriff in the chambers of the Court in the presence of the Commonwealth Attorney, the County Attorney and counsel for defense. The petitioner was seated in the court room and not in the presence of the Court when the response was made.

Some two or three weeks after the trial, counsel for defense overheard D. R. Johnson and Eddie Florence talking in Johnson's furniture store about the qualifications of petit juror Herman McClanahan. Petit Juror McClanahan had told Mr. Johnson, a member of the Grand Jury that indicted petitioner for murder, that he, McClanahan, would send petitioner to the penitentiary for things petitioner had done in the past and he did not care about the guilt or innocence of petitioner.

Subsequently McClanahan was chosen to sit on the jury that found petitioner guilty of voluntary manslaughter and sentenced him to fifteen years in the penitentiary.

Upon *voir dire* examination McClanahan stated he had already made up his mind as to the guilt of petitioner. He further stated it would take evidence to remove it from his mind. Mr. McClanahan then stated he could forget his opinion and try the case strictly on the evidence (VD—Qs. 8-10, EXHIBIT C).

Mr. McClanahan then said that if no evidence was presented at all he could *not* say the defendant was "not guilty."

Petitioner has preserved all federal questions by making timely objections.

At the hearing on motion for new trial the juror in issue, Mr. McClanahan, repeatedly refused to answer directly whether he had made the statement purported to him by the testimony of D. R. Johnson and Eddie Florence (HOMFNT 20).

The Court refused petitioner's motion for a new trial and on appeal the Court of Appeals of Kentucky affirmed.

In its opinion rendered October 15, 1965, affirming the conviction, the Court touched on both issues only in passing and failed to discuss the substantial issue involved.

In refusing to reverse the trial court the Court of Appeals declared the communication between the Court and jury as not a "substantial proceeding" within the meaning of the law entitling defendant to be present at every state of the proceedings.

The Court, in considering the bias and prejudice of the juror, dismisses the question because the objection to the juror was not timely made. Also, the juror swore he could disregard his opinion and require the Commonwealth to prove its case beyond a reasonable doubt. The real issue was never met and that is whether the statement made by the juror, Mr. McClanahan, indicated such a bias and prejudice as to deny petitioner his right to a fair and impartial trial. The objection was timely made upon the discovery of the statement having been made. The statement was made prior to the trial and conclusively establishes such bias and prejudice as to make the question one of law and not of fact.

## REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals of Kentucky should be reviewed because that Court has decided a Federal question of substance involving the due processes of law and the Constitution of the United States which has not heretofore been determined by this Court. The Court of Appeals of Kentucky has decided it in a way not in accordance with the applicable decisions of other Federal Courts or in accord with the Constitution.

The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law.

The Sixth Amendment guarantees to the accused in a criminal prosecution the right to a speedy and public trial by an impartial jury.

The Fourteenth Amendment guarantees that no state shall deprive any person of life, liberty, or property without due process of law.

The guarantee to all persons accused of capital criminal offenses of the right to a trial by an impartial jury presents to This Honorable Court the main question upon which petitioner relies for a review of the Federal question which was erroneously decided by the Court of Appeals of Kentucky.

The right of an accused to a trial by an impartial jury has been denied petitioner and this is so whether the defect is discovered before or after the verdict.

It is the contention of the petitioner that the statement made by juror McClanahan clearly manifested a secret bias and prejudice such as to deny petitioner has

right to a trial by an impartial jury and such bias or prejudice may be raised when it is discovered either before or after the trial.

It is important to note that the statements attributed to juror McClanahan which he did not deny making were made before the trial, even before McClanahan was chosen to serve on the petit jury which returned a verdict of 15 years for voluntary manslaughter. These statements, though made before the trial, were discovered by defense counsel overhearing a conversation on the street after the trial between two persons who had talked to and heard juror McClanahan make the statements which indicated his bias and prejudice which could not be set aside regardless of what juror McClanahan swore he would do. Therefore, this bias and prejudice is such as to deny petitioner his right to a trial by an impartial jury as a matter of law.

This bias and prejudice could not have been discovered on *voir dire* examination because the juror made the statement under oath that he could set aside his opinion as to the guilt or innocence of petitioner and try the case on the facts as they were presented. This qualifies the juror by law in Kentucky. However, the statements made by juror McClanahan indicate he did not try the petitioner on the facts as presented in the trial, rather by juror McClanahan's own statements, which he did not deny, juror McClanahan "sent him to prison for things he had done in the past."

Petitioner further contends that he was denied due process of law when the jury was placed in the custody of Sheriff Hall, a witness who had testified against pe-

titioner. To permit Sheriff Hall to remain close to the jury throughout the course of deliberations was to create a silent influence on the jury. Sheriff Hall is the same man who arrested Gordon Levi on the open charge at 12:00 P.M. the night of the killing. He therefore had a personal interest in the outcome of the trial and it was a denial of petitioner's right to a fair and impartial trial to permit such a person to take custody of the jury when it retired for deliberations.

This is apparent when the jury communicated with the Court by note which was carried from the jury room to the judge's chambers by this same Sheriff Hall. Certainly it is altogether possible that some off-hand comment or facial gesture could have been communicated to the jury and had an influence on the outcome. Certainly with all the officers of the Court who are available someone other than the arresting officer who testified against the petitioner could have taken custody of the jury and prevented the silent remainder from participating in the jury process.

In *United States, ex rel De Vita* v. *McCable,* District Court, New Jersey, July 14, 1955, 133 Fed. Supp. 169 at page 176, the Court states there is no doubt that a trial by impartial jurors is a fundamental right. The *De Vita* case, *supra,* raises the issue of bias but decides there was no bias. In the case at bar petitioner contends there existed such bias. More importantly, juror McClanahan did not reveal this bias on *voir dire* examination.

The disqualification of a juror which entitles petitioner to a new trial was not discovered until after the

verdict. This disqualification meets three tests as set down in the *De Vita* case, *supra*. First, the later discovered information is a disqualification, being that juror McClanahan could not try the petitioner on the evidence as produced in Court. Second, bias is shown and indicated. Third, the juror intentionally concealed the information when he responded he could set aside the opinion as to guilt or innocence and try the petitioner on the evidence as produced in Court. This statement is a direct contradiction to the statements made to Mr. Johnson and Mr. Florence.

In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.

In re *Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682; *Turner* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn," Co. Litt., 155B. His verdict must be upon the evidence based at the trial.

This was written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807):

> "Light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constiute no sufficient objection to a juror, but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them,

which will combat that testimony and resist its force, do constitute a sufficient objection to him."

"The theory of the law is that a juror who has formed an opinion cannot be impartial."

*Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244, 246.

In the case at bar, the juror had formed an opinion and expressed it. This is such an opinion as to clearly indicate a bias and prejudice which makes the juror incompetent.

While petitioner does not question the validity or constitutionality of the state law which permits a juror to serve after he swears to set aside his opinion and try the case on the evidence as produced in the Court, the rule "cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." *Lisenba* v. *California*, 314 U. S. 219, 236, 86 L. Ed. 166, 180, 62 S. Ct. 280.

The test as presented in *Reynolds* v. *United States*, 98 U. S. 145, 155, 25 L. Ed. 244, is "whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact."

The contention of petitioner on the basis of the expressed opinion of juror McClanahan not discovered until after the trial is that he was denied due process of law as guaranteed by the Fourteenth Amendment in that petitioner did not receive a trial by "impartial jurors."

As Chief Justice Hughes observed in *United States* v. *Wood,* 299 U. S. 123, 145, 146, 81 L. Ed. 78, 87-89, 57 S. Ct. 177:

> "Impartiality is not a technical conception. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

In the case of *Ness* v. *Cunningham,* January, 1963, 313 F. 2d 929, the Court restated the well established rule that the "right of an accused to be present at every stage of his trial for a felony especially where capital punishment is involved, is so fundamental that the right may not be waived." In the case at bar the Court and attorneys made the decision in the absence of petitioner. The petitioner contends that allowing any person, especially the arresting officer under the facts of the case at bar, to communicate with the jury out of the presence of the petitioner, the judge and all the attorneys affected petitioner's basic rights.

## CONCLUSION.

Petitioner respectfully submits that juror McClanahan was incompetent to serve on the jury after his expressed opinion that he "would send him (petitioner) to prison for things he has done in the past."

The manifested prejudice is proved by two disinterested persons subpoenaed to verify the statement made by juror McClanahan. Juror McClanahan did not deny that he made the statement, merely saying he

could not remember whether he had made the statement or not. The undisputed fact is that juror McClanahan made the statement, which makes him incompetent to serve as a juror.

The conviction by an incompetent juror is a denial of petitioner's Constituional right to an impartial trial.

Petitioner further contends that the cumulative effect of permitting the arresting officer who testified against petitioner to take custody of the jury when it retired for deliberations; the use of the arresting officer as a courier between the jury and the judge not in the presence of petitioner; and the fact that one of the jurors was as a matter of law bias and prejudiced against petitioner as a result of his expressed opinion against petitioner effectively denied petitioner due process of law and his fundamental right to a trial by a fair and impartial jury.

For this reason, and the other reasons heretofore mentioned, petitioner respectfully submits that this Court ought to grant a review of his case.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
JUL 20 1966
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 375

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R. GORDON LEVI, - - - - - Petitioner,

*versus*

COMMONWEALTH OF KENTUCKY, - Respondent.

---

## APPENDIX A, B AND C FOR PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

---

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## APPENDIX A AND B.

# COURT OF APPEALS OF KENTUCKY

RENDERED: OCTOBER 15, 1965
AS MODIFIED APRIL 22, 1966

R. GORDON LEVI, - - - - - - - *Appellant,*

*v.*

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

*Appeal from Harrison Circuit Court,*
*Honorable John P. Lair, Judge.*

## OPINION OF THE COURT BY JUDGE HILL —AFFIRMING.

Appellant seeks a reversal of a verdict and judgment finding him guilty of voluntary manslaughter, and fixing his punishment at 15 years in prison. He contends (1) he was entitled to an instruction on self-defense and involuntary manslaughter, (2) the trial court committed error in answering a written question submitted by the jury during his absence, and (3) that he was entitled to a new trial on the ground one juror had expressed an opinion before the trial.

Appellant, age 65, six feet three inches tall, weighing 215 pounds, was charged with killing William Hoffler, a man between 70 and 75 years of age, five feet six inches tall, and weighing 135 pounds.

Apparently the appellant is a thrifty man from the evidence that he owns 60 houses, including a one or two story

building with a basement, the scene of the alleged crime. Beds were rented in this building at the rate of one dollar per night for basement lodging and two dollars per night for beds on the first floor. This house is located on the appropriately named "Pleasant Street" in Cynthiana, Kentucky.

Deceased "signed in" for a bed February 11, 1964, and was found dead in his upstairs room the following day. During the night of the 11th and on the following day, about seven customers were lodged in the house. There were two women, one the daughter of appellant, and the other according to some testimony, a Lesbian. There was considerable drinking also.

Dr. James T. McClelland, a pathologist, performed an autopsy and testified deceased had a deep laceration above the right eye, an abrasion over the right cheek and yet another laceration on the bridge of his nose, so that his nasal bones were "in pieces"; that there was bleeding from these injuries, from which he concluded deceased received the foregoing injuries before his chest injuries. The doctor stated he applied pressure to the chest of deceased and was amazed to find there was no support. He found fractures of the second, third, fourth, fifth, sixth and seventh ribs of the right side, and fractures to the third, fourth, fifth, sixth, seventh and eighth ribs on the left side. The breastbone was fractured. The pleural cavity was filled with blood; the right atrium of the heart was ruptured and exploded, and all the blood spilled out into the chest cavity; the heart was squeezed against the blackbone and had ruptured like a balloon; the liver was broken so that one-half of the left part was lying free. He testified deceased also had a ruptured groin; that the mouth of deceased contained upper and lower plates, the latter broken.

Appellant does not argue the circumstantial evidence was not sufficient to convict, but he says inasmuch as all of

the evidence was circumstantial, he was entitled to an instruction on self-defense and involuntary manslaughter.

Under Criminal Law, 23A C. J. S. Section 1190, the general purpose of instructions in criminal cases is thus stated:

> "The sufficiency of instruction must be determined by the facts in each case. The purpose of instructions being to define, and direct the attention of the jury to, the legal principles applicable to the particular case, instructions should be full, clear and explicit, giving to the jury all of the law so far as it relates to the issues proved or claimed to be proved, if such issues are sustained by any evidence or any legitimate inference therefrom."

Our question is whether there was any evidence of *legitimate inference from the evidence* that the crime was or could be classified as involuntary manslaughter. KRS 435.022 defining and providing a penalty for involuntary manslaughter is as follows:

> "(1) Any person who causes the death of a human being by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of conduct of a reasonable man under the circumstances shall be guilty of involuntary manslaughter in the first degree and shall be confined in the penitentiary for not less than one nor more than fifteen years.
>
> "(2) Any person who causes the death of a human being by reckless conduct according to the standard of conduct of a reasonable man under the circumstances shall be guilty of involuntary manslaughter in the second degree and shall be imprisoned in the county jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both."

We cannot believe the atrocious manner in which deceased met his death was no more than a "manifestation of a wanton indifference to the value of human life," or "reckless conduct," as defined in the involuntary manslaughter statute above quoted. We conclude from the evidence of the acts which produced death of Hoffler, that such acts must have been committed only by one having malice aforethought, or in sudden heat and passion, or in sudden affray upon provocation ordinarily calculated to excite passion beyond control. Nothing less.

Furthermore, the penalty fixed by the jury of 15 years was far greater than the minimum penalties for both voluntary and involuntary manslaughter. It is obvious that had an involuntary instruction been given, it would have been ignored by the jury. Bartley v. Commonwealth, 300 Ky. 152, 188 S. W. 2d 102 (1945).

Neither do we find appellant was entitled to an instruction of self-defense. True, appellant had a slight injury on his face, but he testified he received it when falling over a dog into a door facing. This is not one of those typical cases where there was evidence of a struggle and we have held a self-defense instruction proper. In Blackburn v. Commonwealth, Ky., 349 S. W. 2d 197 (1961), defendant was convicted on circumstantial evidence and contended he was entitled to a self-defense instruction. In answer to his contention the Court said:

> "We have adopted the rule that where the evidence is wholly circumstantial in a case like the one before us, if there is no evidence of a struggle or if the facts do not reveal the manner in which the deceased met death, such an instruction (self-defense) should not be given."

Appellant next argues his substantial rights were violated by a written question sent the judge and his written

answer thereto. During deliberations the jury sent the trial judge the following written communication:

"What would be the time before parole would be granted upon the following:

Answer:

21 Years, _____
10 Years, _____
5 Years, _____
2 Years, _____

Thank you,

Jim Cole, Foreman."

It is shown by the affidavit of the trial judge that, after free discussion with attorneys for defendant and the Commonwealth, he returned the written question with the following notation thereon:

"This is strictly a matter for the Parole Board. You are not to consider it in any way."

The record does not show defendant objected to this incident. From the hearing on defendant's motion and grounds for new trial, it is indicated the objection was raised "15 or 20 minutes" after the jury verdict. It is conceded first, however, the incident did occur at a time and while the trial judge and attorneys were in a conference room and out of the presence of the defendant. We do not consider this incident to be a substantial "proceeding" in defendant's trial within the meaning of the law entitling defendant to be present at every stage of the proceedings. There was nothing in the incident in any manner prejudicial to the rights of defendant.

Finally, appellant complains one of the jurors formed and expressed an opinion before the trial and failed to disclose it on voir dire examination. A transcript of such examination of the jury, McClanahan, properly certified by the court reporter, is in the record. It shows the juror freely admitted he had formed an opinion, but said he

could disregard it and require the Commonwealth to prove its case beyond a reasonable doubt. He was not asked whether he had expressed such opinion. He admitted to counsel for defendant he was a life-long friend to defendant, and the assistance given by counsel for defendant to this juror in his leading questions clearly indicated he was a welcome juror for defendant. Furthermore, this record does not show defendant challenged this juror or made any objection to his acceptance until after the verdict. That was too late. KRS 29.025. At any rate, this juror demonstrated his veracity when he freely admitted he had formed an opinion. The trial judge believed he could disregard his previously formed opinion by his failure to excuse. Such a juror is qualified. Smith v. Commonwealth, 100 Ky. 133, 37 S. W. 586 (1896); Coates v. Commonwealth, 255 Ky. 18, 72 S. W. 2d 714 (1934).

We find no error substantially affecting the rights of appellant and accordingly affirm the judgment.

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## APPENDIX C.

---

THE COMMONWEALTH OF KENTUCKY

THE COURT OF APPEALS

Fall Term, October 15, 1965

---

R. GORDON LEVI

*v.*

COMMONWEALTH OF KENTUCKY

*Appeal from a judgment of the Harrison Circuit Court.*

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### MANDATE.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

Drexell R. Davis, C. C. A.,
By (s) Hume Sory, D. C.

A copy—Attest:
Issued April 22, 1966.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 375 Misc., October Term, 1966

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R. GORDON LEVI.....PETITIONER

V.

COMMONWEALTH OF KENTUCKY.....RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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## BRIEF FOR RESPONDENT IN OPPOSITION

---

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IN THE

# Supreme Court of the United States

No. 375 Misc., October Term, 1966

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R. GORDON LEVI.....*Petitioner*

v.

COMMONWEALTH OF KENTUCKY.....*Respondent*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY**

**BRIEF FOR RESPONDENT IN OPPOSITION**

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## OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is styled *R. Gordon Levi v. Commonwealth of Kentucky*, Ky. 405 S.W. 2d 559 (April 22, 1966).

## JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (3), the proper provision for review of a state court judgment in a criminal case on certiorari. However, as will appear from the first portion of our argument, the questions petitioner attempts to present here under the Constitution of the United States have never been properly presented to or decided by the courts of Kentucky and this case is not ripe for the jurisdiction of this Court.

## QUESTIONS PRESENTED

I.

WHETHER THE QUESTIONS PETITIONER RAISES IN THIS COURT HAVE BEEN PROPERLY PRESERVED IN THE STATE COURTS SO AS TO WARRANT THE INVOCATION OF THE JURISDICTION OF THIS COURT.

II.

WHETHER A PERSON ON THE JURY BEFORE WHICH PETITIONER WAS TRIED WAS BIASED, RESULTING IN A DENIAL TO THE PETITIONER OF DUE PROCESS OF LAW AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III.

WHETHER THE ABSENCE OF PETITIONER BY THE STIPULATION OF HIS COUNSEL AT A TIME WHEN HIS COUNSEL, THE ATTORNEY FOR THE STATE AND THE COURT AGREED ON A NEGATIVE RESPONSE TO A NOTE FROM THE JURY DEPRIVED PETITIONER OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

## CONSTITUTIONAL PROVISIONS INVOLVED

Counsel for petitioner has properly quoted in his brief the first section to the Fourteenth Amendment to the Constitution of the United States under which this case is to be decided. Peitioner also quotes the due process clause of the Fifth Amend-

ment. Since this is a petition to review a judgment of a state court in a criminal case, the Fifth Amendment is not involved. Except for the fact that it applies to the states rather than to the United States, the Due Process Clause of the Fourteenth Amendment reads virtually the same as the Fifth Amendment, so we do not understand why counsel quotes the Due Process Clause of the latter provision.

Nor is the Sixth Amendment guarantee to a trial by jury involved. The question is rather, the state having given petitioner the trial by jury guaranteed by the Constitution of Kentucky, there was a biased person on the jury resulting in a deprivation of the fairness and the impartiality of the tribunal which is fundamental to the concept of due process guaranteed by the Fourteenth Amendment. Compare *Turner v. Louisiana*, 379 U.S. 466, 471, 13 L.ed. 2d 424, 428, 85 S.Ct. 546 (1965).

We do not mean to suggest that the determination of which Amendment is involved would make a difference in the ultimate disposition of the case. It would not. Due process compels the same impartiality and fairness in a state court that it does in a federal court. But since it does, there is no need to confuse the issues in this case by an argument as to the applicability of the Sixth Amendment.

## STATEMENT

On February 24, 1964, the Grand Jury of Harrison County, Kentucky, returned an indictment charging the petitioner with the murder of one William Haufler on February 12, 1964. (Transcript of Record from Harrison Circuit Court, hereafter TR, page 5). On May 28, 1964, after a trial on the merits upon his plea of not guilty, petitioner was found guilty of voluntary manslaughter by the petit jury and his punishment was fixed at fifteen years in the penitentiary. (TR 10, 11, 12). The conviction was affirmed by the Court of Appeals on October 15, 1965, and petitioner's petition for rehearing was overruled on April 22,

1966. *Levi v. Commonwealth*, Ky. 405 S.W. 2d 559 (April 22, 1966). A discussion of the atrocious manner in which petitioner stomped his victim to death (set out on page 2 of the opinion of the Court of Appeals of Kentucky) is not necessary to a disposition of the petition since the only questions raised relate to the trial processes.

Many statements made in the petition are not supported by the record. On page 6 of the petition it is stated that: "Petitioner has preserved all federal questions by making timely objection." Throughout the entire proceedings beginning with the trial court and up to the time the petition for certiorari was filed, we find only two references which would indicate even a remote connection with federal questions in this case. On pages 16 and 17 of the Brief for Appellant in the Court of Appeals of Kentucky (concerning the absence of the defendant during a discussion by the court and counsel on a note from the jury) the following appears:

> "The Rules of Criminal Procedure recently adopted by the Commonwealth of Kentucky, effective on January 1, 1963, provide (Rule 8.28):
>
> > "'The defendant shall be present at the arraignment, at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of the sentence. . . .'
>
> "*This rule* is based upon the Fourteenth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution. It has also long been the case law of the Commonwealth of Kentucky and of the entire United States. However, *we present this rule because*, so far as we know, this is the first case where the rule has been brought before the Court of Appeals since its adoption. We urge that to avoid future difficulty with regard to the right of a defendant to be present during the trial, that this court strictly interpret Rule 8.28 by reversing the conviction herein on the ground the

> court conducted one portion of the trial in the absence of the accused." (Emphasis added)

Kentucky cases were cited in the argument of petitioner and the quoted reference is the only one we have been able to find in the record to the Federal Constitution concerning the absence of the accused during the discussion by the court and counsel outside of the presence of the jury regarding the note from the jury. The Brief for Appellant in the Court of Appeals of Kentucky contains no reference whatsoever either to the State or Federal Constitutions in the argument regarding the qualification of a juror. (Brief for Appellant, pages 19-24). In petitioner's petition for rehearing (where a question may not be raised for the first time under Kentucky procedure), there appears the sole reference (page 11):

> "There is likewise no dispute but that the Constitution of the United States and the Constitution of the State of Kentucky both specifically guarantee to every accused the right to a trial by impartial jurors. Nothing can change the clear facts of this case and the clear language of the Constitution."

It is manifest that the Court of Appeals of Kentucky did not consider that the petitioner had raised any question under the Constitution of the United States because it was not even alluded to in the discussion on the note from the jury and the alleged biased juror. Nor does petitioner show he raised any of these questions under the Federal Constitution in the trial court.

Moreover, petitioner never at any time, with or without references to the Constitution of the United States, questioned the propriety of the custodian (the sheriff) of the jury. Since the latter point was not briefed at all in the Court of Appeals of Kentucky, we have no record on it and are unable to set forth any alleged facts surrounding it.

Bearing in mind these procedural deficiencies, we now make reference to the record concerning the note from the jury and the alleged impartial juror.

During the deliberation of the jury a note was handed to the sheriff for delivery to the Court. The facts surrounding the transmittal of the note from the jury and the response thereto as stated in an affidavit of the trial judge on the hearing on motion for new trial are stipulated to be correct. The material portions of the affidavit as contained in the transcript of the hearing on the motion which is a part of this record are set out in full as follows (Transcript of Hearing, pages 2-4):

> "Affiant further says that upon the conclusion of the case the Jury retired to the Jury Room for deliberation and that Sheriff C. C. Hall was directed to place himself outside the Jury Room at all times during said deliberation and was admonished according to law.
>
> "Affiant further says that he then returned to Chambers and shortly thereafter was joined by John Young Brown, of Lexington, Kentucky, and Royce Pulliam of Cynthiana, Kentucky, Counsel for the defendant Levi, and by G. L. Tucker, Commonwealth's Attorney, and by John M. Keith, County Attorney. That during the ensuing period of time and while waiting upon said Jury, the Sheriff of Harrison County knocked upon the door and was directed to enter. In the presence of the five persons above mentioned, the Sheriff handed a closely folded note to this affiant and stated that it was from the Jury. The Court thereupon opened said note in the presence of all of those above mentioned and the following question contained therein in substance was:
>
> "What would be the time before parole would (could) be granted upon the following:

| | Answer: |
|---|---|
| 21 years | |
| 10 years | |
| 5 years | |
| 2 years | |

Thank you.

Jim Cole

Foreman

"It was immediately decided by the four attorneys and the Court that such information as requested could not be answered to the Jury either in Chambers or in open Court. The question of what answer the Court should give them was then freely discussed among the Attorneys for the defendant, the attorneys for the Commonwealth and the Court and it was finally decided, with the full and complete agreement and consent of all five persons above mentioned that the following answer was proper and should be, and was, in substance, and to the best of this affiant's knowledge and belief in exact words as follows: 'This is strictly a matter for the Parole Board. You are not to consider it in any way. John P. Lair, Judge of the Harrison Circuit Court.'

"This affiant further states that the above quoted answer constitutes the only answer made to said question and to the Jury and that no information requested by said Jury or any Juror was furnished them."

It was further stipulated that the events referred to above occurred out of the presence of the accused.

The circumstances surrounding petitioner's complaint about the juror, Herman McClanahan, are as follows. The three-page voir dire of McClanahan is a separate part of the record brought before this Court. On the first two pages a portion of the questions and answers during interrogation by the prosecuting attorney reads as follows:

"Q. 4. *Do you know the defendant, Gordon Levi?*

A. *Yes—since I was a teen-ager.*

Q. 5. *Have you been good friends?*

A. *Yes.*

Q. 6. Have you read about this in the papers?

A. Yes, I have and I have heard lots of talk.

Q. 7. *Did you form an opinion as to his guilt or innocence?*

A. *Yes, I did.*

Q. 8. *Would it require evidence to remove your decision from your mind?*

A. *Yes.*

Q. 9. *Do you think you could forget your opinion and try the case strictly from the evidence you will hear here?*

"A. *Yes, I could.*

Q. 10. If there was no evidence submitted at all, could you say right now that he is not guilty?

A. No.

Q. 11. Will you keep an open mind and give both sides a fair and equal trial?

A. Yes." (Emphasis added)

On the next two pages the questioning by counsel for defense appears as follows:

"Q. 1. You say you were friends of both the Defendant & the Decedent?

A. Yes.

Q. 2. You say you have made up your mind about this case?

A. Yes.

Q. 3. But you do feel you could lay all this aside?

A. Yes.

Q. 4. Would it put you in a difficult position to try to forget your original opinion?

A. No, it would not.

Q. 5. Would you make the Commonwealth prove their case against the Defendant beyond a shadow of a doubt?

A. Yes.

Q. 6. After all the evidence was in and you had a doubt in your mind, could you return a verdict of not guilty?

A. Yes.

Q. 7. Do you realize that you and the other members of the jury are to be the sole judges in this case and that when you make up your mind, regardless of whether it agrees with the other members of the jury, you should stick to your conviction?

"A. Yes, I do.

Q. 8. Could you stand alone in your decision or would you go with the others if you disagreed?

A. I would stand alone."

A witness for the petitioner on his motion for a new trial testified that McClanahan told him he did not know whether the petitioner was guilty but if he was on the jury he would send petitioner to the penitentiary for the things he has done in the past. The juror McClanahan also testified at the hearing on the motion for a new trial. He did not recall the statement (TR 19). Upon cross-examination at the hearing by counsel for petitioner the first and second questions and answers were:

"Q. 1. You said you had already made up your mind?

A. Yes.

Q. 2. You said it would take evidence to remove it from your mind?

A. Yes." (TR 20)

After a question and objection, the 4th, 5th and 6th questions and answers were:

"Q. 4. At the time you were being questioned, did you believe him guilty?

A. No sir.

Q. 5. What did you think?

A. There was no evidence yet.

Q. 6. Do you deny saying that you would send him to the penitentiary?

A. I don't remember saying it." (TR 20)

No question was ever asked on voir dire by counsel for petitioner as to whether the juror had previously *expressed* the opinion he had formed.

There are a number of additional statements in the petition which are not supported by the record. On page 6 of the petition reference is made to a conversation allegedly overheard by defense counsel. This statement has no support in the record and must be disregarded.

It is stated also on page 6 that the juror McClanahan stated he had already made up his mind as to the guilt of petitioner. This is not true. As we have indicated above, what he said on voir dire is that he had formed an opinion as to the "guilt or innocence" of petitioner. Moreover, as pointed out by the Court of Appeals of Kentucky, the voir dire of McClanahan was so pleasing to petitioner that petitioner raised no objection to the juror for cause.

On the bottom of page 6, petioner says he has preserved all federal questions by making timely objections. This is false. Petitioner has not saved any federal question.

On the top of page 7, petitioner says that juror McClanahan repeatedly refused to answer a question relating to a statement he had made out of court. This is false. McClanahan's testimony clearly indicated his absolute honesty wherein he repeatedly stated he could not recall. He did not refuse to answer.

On page 7, petitioner states that the Court of Appeals of Kentucky "touched on both issues only in passing and failed to

discuss the substantial issue involved." This is false. The Court discussed every issue presented by petitioner. The issues presented here were neither presented nor discussed. On page 7, petitioner says the Court of Appeals never met the real issue with respect to the juror relating to previously formed bias and prejudice. Again this is false. The opinion of the Court of Appeals of Kentucky concludes in the second last paragraph with a statement that the juror could disregard his previously formed opinion and that such a juror is qualified under the law of the Commonwealth of Kentucky.

On page 9, petitioner refers to statements discovered by defense counsel in overhearing a street conversation. This is not supportd by the record and may not be considered. Petitioner says on page 9 of the petition that he was denied due process of law by virtue of the fact that the jury was placed in the custody of the sheriff who also testified. Petitioner may have thought of this question in church or some other place unknown to us, but it has never been presented to any court of the Commonwealth of Kentucky and will simply be disregarded in this proceeding.

## ARGUMENT I

### ISSUES UNDER THE UNITED STATES CONSTITUTION WERE NEITHER RAISED NOR DECIDED IN THE COURTS OF KENTUCKY AND THIS CASE IS NOT WITHIN THE JURISDICTION OF THE SUPREME COURT.

As shown in our statement above, petitioner has not properly raised the federal constitutional issues he now asserts. Petitioner seeks to ignore the procedural defects in his petition by the unwarranted, unsupported, and untrue statement on page 6 of his petition that: "Petitioner has preserved all federal questions by making timely objection."

Rule 23-1 (f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court,* at which, and *the manner in which,* the federal questions sought to be reviewed were raised; *the method of raising them* (e.g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."* (Emphasis added.)

It takes no extensive argument for the conclusion that petitioner's statement above does not comply with this rule.

Moreover, we can demonstrate conclusively that this case is not properly within the jurisdiction of this Court. As we have shown in our Statement above, petitioner's brief in the Court of Appeals of Kentucky only twice alluded to the federal Constitution. In relation to the note from the jury, petitioner relied on Rule 8.28 of the Kentucky Rules of Criminal Procedure and simply stated in his brief that the criminal rule is *based* upon the Fourteenth Amendment of the United States Constitution. Petitioner then called for a strict interpretation of the rule. There was no indication that he was *relying* on the Fourteenth Amendment.

The only reference to the United States Constitution with respect to the alleged impartial juror occurred in the *Petition For Rehearing* wherein petitioner stated that "There is likewise no dispute but that the Constitution of the United States and the Constitution of the State of Kentucky both specifically guarantee to every accused the right to a trial by impartial jurors."

These references were insufficient to raise constitutional issues under Kentucky law and the questions presented here were neither passed upon nor alluded to by the Court of Appeals of Kentucky. Rule 1.210 (a) 2 of the Court of Appeals of Kentucky provides:

> "[Every brief shall contain] A 'STATEMENT OF THE QUESTIONS PRESENTED,' which shall state in the clearest and briefest form, and separately number, each of the principal questions involved on the appeal. *The Court will not consider, except for special cause, questions not so set forth.* (Emphasis added)

And it is too late under Kentucky procedure to raise a question for the first time on a petition for rehearing in the Court of Appeals of Kentucky. *Howard v. Commonwealth*, Ky., 395 S.W. 2d 355, 359 (1965).

The subject matter of what indication that a state court's decision turned on a federal question will move the Supreme Court to review it is extensively discussed in Annotations at 84 L.ed. 925 (1940) and 100 L.ed. 1200 (1956). As indicated, and supported by a great mass of authorities from this Court, it is necessary for a petitioner to show that a federal question actually arose in a case (84 L.ed. 927), and that it was actually passed upon and decided by a state court. 84 L.ed. 935.

And, as stated in *Edelman v. California*, 344 U. S. 357, 97 L. ed. 387, 391, 73 S. Ct. 293 (1953):

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

As far as the question relating to the presence of petitioner during the discussion of the note from the jury, this case is similar to *Beck v. Washington*, 369 U. S. 541, 553, 8 L. ed. 2d 98, 109, 82 S. Ct. 955 (1962), where the mere reference to petitioner's constitutional contention in one sentence of his brief in the Wash-

ington Supreme Court was considered to be an insufficient raising of the question. As for the alleged impartial juror, this case is somewhat comparable to *Lynumn v. Illinois*, 372 U. S. 528, 9 L. ed. 2d 922, 927, 83 S. Ct. 917 (1963) where the Court indicated that there would have been color to a claim by Illinois of lack of jurisdiction, except for an express response to a request for certificate from this Court. It appears from an earlier memorandum decision in the case (368 U. S. 908, 7 L. ed. 2d 128, 82 S. Ct. 190 (1961)), that the constitutional question presented there was assigned as error in a petition for rehearing in the state appellate court which was denied without opinion. Although the memorandum decision by this Court in that case authorized the petitioner to obtain a certificate showing that the question had been decided below, extensive authorities were cited in the dissenting opinion of Mr. Justice Frankfurter for the proposition that the question would not have been properly before this Court without the certificate.

Finally, as stated in *Maxwell v. Newbold*, 18 How. (U. S.) 511, 15 L. ed. 506, 508 (1856):

> "... But to bring that question for decision in this court, it is not sufficient to raise the objection here, and to show that it was involved in the controversy in the state court, and might, and ought, to have been considered by it when making its decision. It must apear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and their decision against the right claimed under it."

It is manifest that the petitioner has not shown that the questions he raises herein were properly presented and decided either in the state trial court or appellate court and they have not been brought within the jurisdiction of this Court.

## ARGUMENT II

## THE RECORD DOES NOT SHOW THAT A JUROR WAS BIASED, RESULTING IN A DENIAL TO THE

## PETITIONER OF DUE PROCESS OF LAW AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT.

Petitioner says he was deprived of due process of law because of the presence on his jury of a person who had concealed bias. This is simply not so.

No recent case in this Court concerning the bias of a particular juror has come to our attention. However, it has been stated many times by this Court with respect to a preconceived notion of a juror that: "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U. S. 717, at 723, 6 L. ed. 2d 751 at 756, 81 S. Ct. 1639 (1961). A number of cases of this Court were cited in support of that proposition. The Court stated further in *Irvin* that:

> "The rule was established in Reynolds that '[t]he finding of the trial court upon that issue [the force of a prospective juror's opinion] ought not be set aside by a reviewing court, unless the error is manifest.' 98 US, at 156. In later cases this Court revisited Reynolds, citing it in each instance for the proposition that findings of impartiality should be set aside only where prejudice is 'manifest.'" Ibid.

And further:

> "'Impartiality is not a technical conception.' It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.'" 366 U.S. 724, 725, 6 L.ed. 2d at 757.

Other Supreme Court opinions which support the rule stated above are: *Spies v. Illinois*, 123 U.S. 131, 31 L.ed. 80, 8 S.Ct. 21 (1887); *Reynolds v. United States*, 98 U.S. 145, 155, 25 L.ed. 244, 246 (1879); *Thiede v. Utah*, 159 U.S. 510, 40 L.ed. 237 (1895); *Hopt v. Utah*, 120 U.S. 430, 30 L.ed. 708 (1887).

We are unaware of any case which is precisely the same as this one with respect to the competence of the juror. However, there is considerable similarity between this case and *United States v. Dennis,* 183 F.2d 201 (2nd Cir., 1950), affirmed, 341 U.S. 494, 95 L.ed. 1137, 71 S.Ct. 857. In that case, the defendants Dennis and others were convicted for a violation of the Smith Act for wilfully and knowingly conspiring to organize the Communist Party of the United States as a group to teach and advocate the overthrow of the government by force and violence. All of the defendants were at one time or another officials of the Communist Party. It was shown that one of the jurors had made a speech before the trial began in which he had said: "We are already fighting a war with Communism and it should be a fight to the death;" "We are in a war whether we think we are or not." 83 F.2d at 228. It was held therein that the trial judge acted within the bounds of his discretion in refusing to discharge such a juror.

It is shown from the voir dire examination of the juror complained of that he was a perfectly competent juror under Kentucky law which is not materially different from that set out in the cases above. Counsel has complained falsely throughout these proceedings that the juror failed to acknowledge that he had expressed an opinion relative to the case. Actually, the juror was never *asked* as to whether he had previously *expressed* an opinion against petitioner. The juror was completely honest, stated that he had formed an opinion, but could disregard it. As noted by the Court of Appeals of Kentucky, it is obvious that the petitioner considered the juror a friendly one and therefore left him on the panel rather than exercise a challenge. The fair state of mind of this juror was summed up in his answers at the hearing on the motion for a new trial. When asked what he thought prior to the trial about the guilt or innocence of the petitioner, the juror stated: "There was no evidence yet." (TR 20). He frankly admitted that he did not recall whether he had ever made any statement to the effect that he would send the peti-

tioner to the penitentiary for the things he had done in the past. We do not know how a juror could have more clearly indicated under oath his willingness and ability to judge the case free of any previously formed opinion. The rule which sums up the pretrial comment of this juror, if indeed there was such a comment, is well stated in *Combs v. Commonwealth,* Ky., 356 S.W. 2d 761 (1962) where the Court stated:

> "Basically, the consideration is whether the rights of the accused have probably been prejudiced by concealed impartiality.
>
> "'Mere casual remarks or prior expressions of opinion adverse to accused are not alone sufficient to establish such bias as requires a new trial.'"

Assuming the point to have been properly raised, we are aware of no circumstance in this case demonstrating that petitioner was deprived of a fair jury by the presence of the juror McClanahan. In *Spies v. Illinois, supra,* where the voir dire of a juror was set out at length and is not materially different from that herein, the following portion of the opinion in disposing of the question may well be resorted to herein:

> "'The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. *The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest.* * * * It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.' If such is the degree of strictness which is required in the ordinary cases of writs of error from one court to another in the same general jurisdiction, it certainly ought not to be relaxed in a case where, as in this, the ground relied on for the reversal by this court of a judgment of the highest court of the State is, that the error complained of is so gross as to amount

in law to a denial by the State of a trial by an impartial jury to one who is accused of crime. *We are unhesitatingly of opinion that no such case is disclosed by this record.*" 31 L.ed. at 90. (Emphasis added.)

## ARGUMENT III

## THE CONTENTION THAT PETITIONER WAS DEPRIVED OF DUE PROCESS BY BEING ABSENT DURING A PORTION OF HIS TRIAL IS FRIVOLOUS.

Petitioner contends he was denied due process because of his absence from a conference concerning a note from the jury and the response by the court which was in effect a refusal to answer the request. This contention is frivolous. The note requested information relating to parole under the various sentences which could be rendered by the jury. After discussion of the matter with the attorney for the state and defense counsel, with their agreement, the court returned the question with a notation that "this is strictly a matter for the Parole Board. You are not to consider it in any way." This was the same as no answer at all. It was not a part of the trial. Since the court refused to give the instruction requested, the incident constituted no part whatsoever of the trial. If it were, it would have constituted reversible error in this state. See Annotation, 94 ALR 2d 276, 292 (1964). Kentucky cases in which it was held error to instruct the jury in the absence of the accused are therein collected. However, as noted by the Court of Appeals of Kentucky, there was nothing in the incident in this case in any manner prejudicial to the rights of petitioner, no instructions were given, and the incident was not a "proceeding" in the petitioner's trial within the meaning of the law requiring his presence.

Even if the court had instructed the jury, in the absence of accused, the error would not likely have reached constitutional proportions. See for instance *Snyder v. Massachusetts*, 291 U. S.

97, 78 L. ed. 674, 54 S. Ct. 330, 90 ALR 575 (1934), where the Court held that the petitioner was not denied due process by his absence from a view by the jury. In *Glouser v. United States*, 296 F. 2d 853 (8th Cir., 1961), cert. denied, 369 U. S. 825, 7 L. ed. 2d 789, 82 S. Ct. 840, it was held that there was no denial of the substance of a fair trial in federal court on account of a hearing held in chambers in the absence of accused concerning the competency of a common law wife to testify against the accused. In *Cox v. United States*, 309 F. 2d 614 (8th Cir., 1962), a hearing in chambers in the absence of defendant and the jury concerning the alleged impeachment of a witness, was not considered a deprivation of any constitutional right of the defendant under the Fifth and Sixth Amendments. Other cases on the presence of the accused are summarized and analyzed in the *Cox* opinion. See 309 F. 2d at 616-619.

There is no point in belaboring the matter further. The incident regarding the note from the jury and the negative response of the court thereto had no effect on the outcome of the trial at all, and the contention that it effected a denial of due process is frivolous.

## CONCLUSION

Petitioner has had a fair trial before a court and jury and a fair review in the Court of Appeals of Kentucky. He never raised any federal question properly in the state courts and may not do so at this late date. Moreover, even if such federal questions had been properly raised, the record shows conclusively that the case has been decided in accordance with the provisions of the Constitution and the decisions of this Court. The petition for certiorari should be denied forthwith.

Respectfully submitted,

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## PROOF OF SERVICE

I, George F. Rabe, one of counsel for respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 4th day of November 1966, I served a copy of the foregoing brief on John Y. Brown, counsel for petitioner, 601 Security Trust Building, Lexington, Kentucky, by mailing a copy in a duly addressed envelope with first class postage prepaid, to said counsel at the above address.

George F. Rabe

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